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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DANIEL FLORES,

Plaintiff and Respondent,

v.

ELANA R. MOUSSA, et al.,

Defendants and Appellants.

H028898

(Santa Clara County
Super. Ct. No. CV810230)

I. INTRODUCTION

While driving a Honda Civic on Highway 101 during afternoon rush hour appellant Elana Moussa rear-ended the Ford SUV driven by respondent Daniel Flores. Flores filed a personal injury action against Elana and her father Jacob Moussa,¹ the owner of the Honda Civic. After trial, the jury found that defendant Elana was negligent. However, the jury also found that Elana's negligence was not the cause of Flores's injuries. Judgment was entered against Flores and in favor of defendants.

Flores moved for a new trial on the ground that the evidence was insufficient to justify the jury's verdict. The trial court agreed, finding that the jury should have reached a different verdict on the issue of causation because the testimony of all of the doctors

¹ For the sake of clarity and not out of disrespect, we will refer to Elana Moussa as Elana and Jacob Moussa as Jacob.

supported a finding that the automobile accident caused injury to Flores. On appeal, defendants contend that the trial court erred in granting the motion for new trial because there is no substantial basis for the trial court's finding on causation.

Applying the highly deferential abuse of discretion standard that governs our review of an order granting a motion for new trial, we conclude for reasons that we will explain that the trial court did not err. Therefore, we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Background

The rear-end collision involving Elana's Honda Civic and Flores's Ford SUV took place on September 28, 2001, on northbound Highway 101 in Redwood City. On August 12, 2002, Flores filed a personal injury action against Elana and her father Jacob. The complaint alleged that Elana's negligence was the cause of the injuries that Flores suffered as a result of the automobile accident. The action proceeded to a six-day jury trial held in January 2005.

B. Jury Trial

1. Accident Facts

Both drivers testified regarding their recollection of the facts of the September 28, 2001, automobile accident. At about 5:00 p.m., seventeen-year-old Elana was driving her father's 1988 Honda Civic with two passengers, her teenage cousins Sheila and Ryan, in the number one lane of northbound Highway 101. They had visited a relative in Woodside and were en route to Elana's home in Foster City. Traffic in the number one lane was moving slowly and Elana decided to change lanes to the number two lane.

Elana recalled that she turned her head to the right and when she looked back, she saw a Ford Expedition SUV with its brake lights on, about one-half car length ahead in lane number one. She braked and two or three seconds passed before her car rear-ended the Ford SUV. At impact, the front of Elana's Honda Civic went underneath the rear end of the SUV. According to Elana, the driver of the Ford SUV rushed out angrily and did

not appear to be injured. The front end of the Honda and the rear end of the Ford SUV sustained damage in the accident as reflected in the photographs of the vehicles that were introduced into evidence. The Honda was towed from the accident scene.

Flores's recollection of the accident differed in some details. Just before the accident occurred, Flores, age 31, and a friend were on their way to San Francisco to attend a baseball game. The friend was sitting in the front passenger seat and Flores's Ford SUV was going about 40 to 50 miles per hour. When traffic ahead stopped, Flores slowed his vehicle and came to a stop. He turned to ask his friend a question and felt a hard hit to his vehicle. His body moved forward and back at an angle due to the impact. After the cars were moved to the side of the road, Flores looked at the damage to his SUV, which is reflected in the photographs of the vehicle that were introduced into evidence. While he was still at the accident scene, Flores told a police officer that his back hurt. However, after the accident Flores was able to drive his SUV to San Francisco and attend the baseball game there.

The police officer who responded to the accident scene noted in his report that Flores told him that his SUV was traveling about five miles per hour at the time of impact. The officer observed minor damage to the rear of the SUV and moderate damage to the front of the Honda. He investigated the accident as a non-injury traffic collision.

Each party presented an accident reconstruction expert. Flores's expert testified that in his opinion the Honda Civic's speed at the time of impact was approximately 10 to 15 miles per hour and the G-force on the Ford SUV was 2.5 Gs to 4 Gs.² Elana's expert agreed that the Honda Civic's speed at impact was 10 to 15 miles per hour, but determined that the G force on the Ford SUV was only one G.

² A "G" is "a unit of force equal to the force exerted by gravity on a body at rest and used to indicate the force to which a body is subjected when accelerated." (Merriam-Webster's Collegiate Dictionary (10th ed. 1999) p. 475.)

Defendants also presented a biomechanical expert, who testified that the force of the impact on Flores's low back was about 1.8 Gs or 206 pounds, less than the 340 pound force (of double his body weight) that he would experience when walking.

2. Accident Injuries and Prior Injuries

Flores testified that his symptoms on the day of the September 28, 2001, automobile accident included low back pain that caused him to leave the baseball game early. The next morning Flores had low back pain and pain radiating down his leg to his toes. He returned to work on October 3, 2001, because his back pain was a little better. His supervisor allowed him to work a lighter residential route in his job as a UPS package driver. He first saw a doctor for accident injuries on October 16, 2001. Between October 3, 2001 and October 16, 2001, Flores continued to work fulltime driving a residential route. He also worked overtime hours directing other people or doing paperwork.

Flores saw Dr. Carlson on October 16, 2001, because his back and leg pain were not improving. Dr. Carlson advised Flores not to work and prescribed medications and physical therapy. In November 2001 Dr. Carlson referred Flores to an orthopedist, Dr. Tonkin, who prescribed a steroid medication and scheduled an MRI of the back. Dr. Tonkin informed Flores that he had a ruptured disc. Flores was then referred to Dr. Page, an orthopedic surgeon, who performed back surgery on February 4, 2002. Eight months after the surgery, Flores felt much improved.

Flores acknowledged that he had been injured in two prior job-related accidents. In April 1999, he injured his back lifting a heavy package off a shelf. Flores received medical treatment and was off work for four months. He returned to work as a UPS package driver a little sore, but without any restrictions on his job activities. In July 2001, Flores's back cramped up while he was at work at UPS and he went down on his knees. Afterwards, Flores had pain going down his leg, but it was not as bad as after the automobile accident. He underwent physical therapy and was able to return to light

duty work. On September 10, 2001, 18 days prior to the subject automobile accident, Flores returned to his regular duties. At that time, he did not have any pain in his back or going down his leg.

3. Expert Opinion Regarding Injuries and Causation

Two physicians testified on behalf of Flores. According to his orthopedic surgeon, Dr. Page, the automobile accident caused Flores to suffer a disc rupture in his low back due to excessive stress on a previously degenerated disc. Dr. Page also believed that the back surgery he performed on February 4, 2002, a lumbar laminectomy and discectomy at L5-S1, was the result of the automobile accident injury.

Dr. McLeod, a specialist in family medicine, is the medical director of the U.S. Healthworks clinic where Flores treated after his job injuries. The U.S. Healthwork's medical records indicated that on September 11, 2001, Flores was seen at the clinic for the last time for his July 2001 back injury. Dr. McLeod's diagnosis was lumbosacral strain. During the September 11, 2001 visit, Flores reported that he felt 95 percent to 100 percent recovered. Dr. McLeod returned Flores to work to work as a UPS package driver without restrictions. If Flores had continued to work for two weeks without any problems after the September 11, 2001 visit, Dr. McLeod probably would have released him from medical care.

One physician, Dr. Levin, testified for the defense. Dr. Levin is an orthopedic surgeon who evaluated Flores to determine what injuries he sustained as a result of the September 28, 2001, automobile accident. According to Dr. Levin, it was more likely than not that Flores suffered the disc herniation in the July 2001 job accident and that Flores would have needed back surgery even if the September 28, 2001, automobile accident had not occurred. However, Flores's attorney elicited Dr. Levin's opinion that Flores had sustained some injury as a result of the automobile accident by reading into the record excerpts from Dr. Levin's deposition testimony. The first deposition excerpt included the following questions and answers:

“[FLORES’S ATTORNEY]: Okay. Now hypothetically doctor, if you assume that on September 10, 2001, [Flores] reported to the U.S. Healthworks and he was working without restrictions, feeling fine, feeling much better, 95 to 100 percent recovered, negative straight leg raising test, no back tenderness, range of motion is full, no signs of radiculopathy, again, can work without restrictions and that work restrictions allow him to bend, stoop, crouch, climb, stand, sit, walk, turn, pivot for up to 9.5 hours per day, five days per week, lift, lower, push, pull and carry up to 70 pounds with an average weight of package being 11 pounds, grasp, reach, maintain control of activities associated with delivering and picking up packages, maintain an acceptable work pace; assume that within a two-week period of time he was capable of doing that, he then had the subject automobile accident with reported symptoms, complaints following as noted by you and the records of Dr. Carlson and Dr. Tonken, Dr. Page of the Camino Medical Group --

“[DR. LEVIN]: Uh-huh.

“[FLORES’S ATTORNEY]: -- Would you not say that the trauma that Mr. Flores sustained in the subject auto accident was at least a significant factor resulting in [the] herniation that was noted on the MRI at L5-S1 and the subsequent surgery?

“[DR. LEVIN]: I believe that there is credence to that, yes.

“[FLORES’S ATTORNEY]: When you say credence, you mean yes?

“[DR. LEVIN]: Yes.”

Defense counsel did not object to the hypothetical question. The second excerpt from Dr. Levin’s deposition that was read into the record, also without objection, was as follows:

“[FLORES’S ATTORNEY]: Okay. So would I also be correct then, you can’t say that Mr. Flores was not injured in this accident; would you agree with that?

“[DR. LEVIN]: No, I cannot say that.

“[FLORES’S ATTORNEY]: You agree with me?

“[DR. LEVIN]: Yes. I don’t know how much injury, but apparently he did have some injury.”

On examination by defense counsel, Dr. Levin clarified that his opinion that Flores probably sustained some injury as a result of the automobile accident was largely based on the history given by Flores himself.

4. Jury Verdict

The jury reached its verdict on January 25, 2005. In response to the first question on the verdict form, “Was Elana Moussa negligent?,” the jury answered “Yes.” However, the jury answered “No” to the second question: “Was Elana Moussa’s negligence a substantial factor in causing harm to Daniel Flores?” Thereafter, judgment was entered in favor of defendants and against Flores.

C. The Motion for New Trial

Flores filed a motion for judgment notwithstanding the verdict and for new trial. Only the motion for new trial is at issue in the present appeal. Flores argued that a new trial should be granted on the ground of insufficiency of the evidence to justify the verdict, because the verdict reached on the issue of causation was clearly against the weight of the evidence. In particular, Flores asserted that Dr. Levin’s deposition testimony supported his contention that the automobile accident was a substantial factor in causing his injuries.

Defendants opposed the motion for new trial, arguing that a new trial should not be granted because substantial evidence supported the verdict, including the evidence showing that the automobile accident was minor, Flores’s symptoms before the accident were similar to his symptoms after the accident, Flores worked overtime hours after the accident, the biomechanical expert opined without contradiction that the forces on Flores’s back during the accident were less than the forces Flores would experience when walking, and Dr. Levin explained that the symptoms of a herniated disc can wax and wane.

The trial court denied the motion for judgment notwithstanding the verdict and granted the motion for new trial. In its written order, the trial court stated that the court agreed with Flores that the evidence was insufficient to support the verdict. The trial court further stated, “the court has weighed the evidence and is convinced from the entire record that the jury clearly should have reached a different verdict on the issue of causation. [¶] The court has considered the credibility of witnesses and has drawn reasonable inferences contrary to those drawn by the jury. The defendants’ medical expert, Dr. Gordon Levin, supports plaintiff’s position that the negligence of the defendant caused some injury to plaintiff.”

Additionally, the trial court specifically noted the excerpts of Dr. Levin’s deposition testimony that had been read into the record at trial, and made the following findings: “Dr. Levin, defendant’s expert, conceded causation. The plaintiff’s doctors also support plaintiff’s proof of causation. In weighing all of the evidence the court concludes that the accident was a substantial factor in causing injury to the plaintiff.”

Defendants filed a timely notice of appeal from the order granting new trial.

III. DISCUSSION

A. The Standard of Review

Code of Civil Procedure section 657³ provides that the verdict may be vacated and a new trial granted upon the motion of an aggrieved party on the ground of “[i]nsufficiency of the evidence to justify the verdict or other decision” (§ 657, subd. (6).)⁴ Section 657 further provides, “A new trial shall not be granted upon the

³ All further statutory references are the Code of Civil Procedure unless otherwise indicated.

⁴ In pertinent part, Code of Civil Procedures section 657 provides, “The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial

ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.” (§ 657, subd. (7).)

Section 657 also governs appellate review of an order granting a new trial. In pertinent part, section 657 states, “[O]n appeal from an order granting a new trial upon the ground of insufficiency of the evidence . . . or upon the ground of excessive or inadequate damages, . . . such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.” Accordingly, trial courts have broad discretion in granting a new trial. (*Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1800.)

The abuse of discretion standard that applies to our review of an order granting a new trial is highly deferential. It is well established that “an order granting a new trial under section 657 ‘must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant [on the trial court’s] theory.’ ” (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412, quoting *Jones v. Citrus Motors Ontario, Inc.* (1973) 8 Cal.3d 706, 710.) Moreover, “ ‘the presumption of correctness normally accorded on appeal to the jury’s verdict is replaced by a presumption in favor of the [new trial] order.’ ” (*Lane v. Hughes Aircraft Co., supra*, 22 Cal.4th at p. 412.)

The rationale for the deferential abuse of discretion standard is that “the trial court sits much closer to the evidence than an appellate court.” (*Lane v. Hughes Aircraft Co., supra*, 22 Cal.4th at p. 412.) Because the trial court is “in the best position to assess the

rights of such party: [¶] . . . [¶] 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.”

reliability of the jury's verdict . . . the Legislature has granted trial courts broad discretion to order new trials." (*Ibid.*) Thus, the only limitations on the trial court's power to grant a new trial are: (1) the trial court must specify its reasons for granting a new trial (§ 657); and (2) "there must be substantial evidence in the record to support those reasons." (*Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal.4th at p. 412.)

Our task in the present appeal, therefore, is to determine whether the trial court abused its discretion in granting a new trial because no reasonable trier of fact could have found for Flores on the theory expressed in the trial court's order. (See *Jones v. Citrus Motors Ontario, Inc.*, *supra*, 8 Cal.3d at pp. 710-711.)

B. The Trial Court Did Not Abuse Its Discretion

Appellants Elana and her father Jacob first argue procedural error, contending that the trial court's order did not satisfy the requirement of section 657 that when a new trial is granted, the trial court's order "shall specify the ground or grounds upon which it is granted and the court's reasons or reasons for granting the new trial upon each ground stated." According to appellants, the trial court's order in the present case is deficient because the order includes only "broad, general conclusions" regarding the court's finding that the accident was a substantial factor in causing Flores's injuries.

We do not find any deficiencies in the trial court's order. "[T]he ground for a new trial is adequately specified if the intention of the court is clear." (*Jones v. Citrus Motors Ontario, Inc.*, *supra*, 8 Cal.3d at p. 710.) Here, the trial court expressly stated that the ground for granting a new trial was the court's determination that the evidence was insufficient to justify the jury's determination that the automobile accident was not a substantial factor in causing Flores's injuries. The order also satisfied the section 657 requirement that the order specify the reasons for granting a new trial upon the ground stated in the order, because the order specified that the opinions of all of the medical experts, including Dr. Levin, the defense medical expert, and plaintiff's physicians,

supported a finding that the automobile accident was a substantial factor in causing injury to plaintiff.

Appellants' chief argument is that the trial court abused its discretion because there is no substantial basis for the trial court's finding that the automobile accident was a substantial factor in causing injury to Flores. Appellants contend that trial court erred in finding that Dr. Levin's deposition testimony constituted a concession on the issue of causation and disturbing the jurors' contrary finding. They point to the general rule that jurors may reject the testimony of an expert witness, even though the witness is uncontradicted, as long as the jurors do not act arbitrarily. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632.)

Appellants also explain that Dr. Levin did not concede causation because his ultimate opinion was that Flores's disc herniation was caused by the July 1991 job-related accident, not the subject automobile accident. Further, appellants challenge the trial court's reliance on the lengthy hypothetical question asked during Dr. Levin's deposition testimony and read into the record at trial, which elicited Dr. Levin's opinion that "subject auto accident was at least a significant factor resulting in [the] herniation that was noted on the MRI at L5-S1 and the subsequent surgery." According to appellants, the hypothetical question was based on facts of dubious validity and therefore the jurors properly rejected Dr. Levin's opinion.

Finally, appellants argue that the trial court ignored the "mountain of evidence" that showed that Flores's back injury and resulting surgery were caused by his two prior job injuries rather than the minor automobile accident. They maintain that this evidence precluded Flores from meeting his burden of proof on the issue of causation.

We are not convinced that the trial court abused its discretion. Appellant's argument on appeal is based on their contention that the weight of the evidence supports the jurors' finding that the automobile accident was not a substantial factor in causing Flores's injuries, and therefore a new trial should not have been granted. As we have

discussed, the weight of the evidence is not the standard of review that applies to an order granting a new trial.

Under the deferential abuse of discretion standard that governs our review, “so long as the outcome is uncertain at the close of trial -- that is, so long as the evidence can support a verdict in favor of *either* party -- a properly constructed new trial order is not subject to reversal on appeal.” (*Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal.4th at p. 414.) Thus, appellants have the burden of demonstrating that “no reasonable finder of fact” could have made a finding in Flores’s favor on the issue of causation. (*Jones v. Citrus Motors Ontario, Inc.*, *supra*, 8 Cal.3d at p. 710.)

We find that appellants did not meet their burden, because the evidence presented at trial was in conflict and a reasonable trier of fact could have made the finding on the issue of causation in favor of Flores. As the trial court correctly determined, the medical experts for both parties concluded that Flores was injured in the automobile accident. Dr. Page, the orthopedic surgeon who performed Flores’s back surgery, testified that the automobile accident placed sufficient force on Flores’s back to cause a disc rupture. Dr. Levin, the orthopedic surgeon retained by appellants to evaluate Flores, testified unequivocally that Flores sustained “some injury” as a result of the automobile accident, although he did not know “how much injury.” Accordingly, we may not reverse the trial court’s order granting a new trial because there is a substantial basis in the record, consisting of expert medical opinion, for the trial court’s determination that “the [automobile] accident was a substantial factor in causing injury to the plaintiff.” For that reason, we will affirm the order.⁵

⁵ Having reached this conclusion, we need not address Flores’s contention that appellants waived their right to appellate review because they failed to fairly summarize all of the facts in the light most favorable to the judgment.

IV. DISPOSITION

The order granting a new trial is affirmed. Respondent shall recover his costs on appeal.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

MCADAMS, J.